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Nos. 84-1748, 84-1812, 84-1864 and 84-1878

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROYCE DAVID HEBERT, PETITIONER
v.
UNITED STATES OF AMERICA

CLIFFORD J. ANTONE, PETITIONER
v.
UNITED STATES OF AMERICA

MIKAL HABEEB AMUNY, PETITIONER
v.
UNITED STATES OF AMERICA

AARON MAXWELL, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the guilty plea proceedings showed that petitioners Antone and Amuny understood the nature of the charges against them, and whether there existed a sufficient factual basis to support the district court's acceptance of their pleas.

2. Whether there was probable cause to arrest petitioners Antone and Amuny.

3. Whether the evidence seized pursuant to a search warrant was the fruit of an antecedent illegal search (petitioners Maxwell and Hebert).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a-20a)[1] is reported at 753 F.2d 1301. The opinion of the district court (Pet. App. 1a-7a) is unreported.

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[1]Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 84-1864.

JURISDICTION

The opinion of the court of appeals was rendered on February 11, 1985, and rehearing was denied for Nos. 84-1812 and 84-1878 on March 15, 1985; and for No. 84-1864 on March 25 (rehearing was not sought in No. 84-1748). The petitions for a writ of certiorari were filed in No. 84-1748 on May 4, 1985; in No. 84-1878 on May 9, 1985; in No. 84-1812 on May 14, 1985; and in No. 84-1864 on May 24, 1985. The petition in No. 84-1748 was not timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were indicted in the United States District Court for the Western District of Texas on charges relating to marijuana possession and distribution. Following the district court's denial of petitioners' motions to suppress evidence, petitioners each pleaded guilty to one count of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846, reserving their rights to appeal the district court's rulings. Each petitioner was sentenced to five years' imprisonment and a $15,000 fine. The court of appeals affirmed.

1. On October 28 and 29, 1982, Customs Patrol Officer Harrison contacted DEA Special Agent Braziel and informed him that Allen Granger and an individual identified as "Randy" were on their way to Austin, Texas, to meet petitioners Clifford Antone and Mikal Amuny to pick up a quantity of marijuana, which was being flown there.[2] Harrison advised Braziel that he had received this information from a confidential informant who in the past had provided information leading to six arrests and the seizure of a quantity of marijuana, and that the informant was getting his

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[2]Unless otherwise indicated, the statement of facts is taken from the opinions of the court of appeals and the district court.

information in this instance through conversations with Granger. On November 1, 1982, Harrison advised Agent Braziel that the marijuana had been landed in Austin and that Granger, driving a blue and white Chevrolet Monte Carlo with Texas license plate number PCQ-658, would meet Antone and Amuny at 7:00 that evening to pick up the substance.

As a result of prior investigations of Antone and Amuny, Braziel was aware from a separate source that Antone conducted marijuana transactions at JoJo's Restaurant near the intersection of Interstate 35 and Oltorf Road in Austin, Texas, and that he used a black or Hispanic male to deliver the marijuana. Braziel placed the restaurant at that intersection under surveillance on the evening of November 1, 1982. He saw Antone and an unidentified black male meet with petitioner Aaron Maxwell in the restaurant parking lot. Maxwell subsequently drove to Amuny's residence, left his pickup there, and drove back to JoJo's in another car. In JoJo's parking lot, Maxwell entered Granger's vehicle—the blue and white Chevrolet Monte Carlo with Texas license plate PCQ-658 that the informant had identified—drove to a convenience store, used its phone, and proceeded to a residence leased by petitioner Royce Hebert. When Maxwell drove the car into the garage and closed the door, Agent Braziel followed him on foot, and, while hiding in the bushes near the garage, heard the trunk of a car open, something being loaded into the trunk, and the trunk close. When he put his nose close to the garage door, he smelled marijuana. Maxwell then drove Granger's automobile back to JoJo's restaurant and went inside. Shortly thereafter, Granger walked out of the restaurant, drove away in his car, and was arrested at a red light. As the arresting officers approached Granger's car, they smelled marijuana. Agent Braziel seized the automobile and, after a warrant to search it was obtained, discovered 58 pounds of marijuana in the car trunk.

Meanwhile, other agents arrested Antone, Amuny,[3] and Maxwell as they were leaving JoJo's restaurant. Agent Braziel also obtained a federal search warrant for Hebert's residence. That search uncovered over 800 pounds of marijuana, several firearms, scales, processing and packaging equipment, and numerous documents and ledgers indicating marijuana buyers, amounts purchased, and prices. A beeper device found on Antone's person incident to his arrest corresponded to a beeper found in the house. Eight phone calls had been made by Granger to Antone's home or the beeper prior to the arrests. See 84-1864 Pet. 5; Jan. 30, 1984 Tr. of Re-Arraignment Proceeding [hereinafter cited as Tr. of Re-Arraignment] 42. Finally, the search revealed personal documents of Antone and Amuny, and fingerprints of Amuny and Maxwell.

2. The district court denied motions to suppress the evidence discovered in the search of Hebert's residence. It concluded (Pet. App. 5a-6a) that Maxwell, Antone, and Amuny did not have "standing" to challenge that search. Despite an affidavit submitted by Maxwell asserting a privacy interest in Hebert's residence, a post-search investigation did not reveal any keys, clothes, or other indicia that he resided there (*id.* at 4a-5a, 6a). Antone and Amuny did not produce any evidence to support any claim they might have had to a privacy expectation in the contents of the home (*id.* at 5a).

Hebert's argument that the search warrant authorizing the search of his residence was tainted by Agent Braziel's preceding unlawful search of the property was rejected on the merits. The district court agreed that Agent Braziel trespassed on the property of Hebert's residence, reasoning that "listening at the garage door and pressing his nose to

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[3]Earlier in the evening, Antone and Amuny had driven to JoJo's together from Antone's house.

that door constituted an invasion of the curtilage of that property sufficient to constitute a search without warrant" (Pet. App. 7a). Accordingly, the district court, citing *Franks* v. *Delaware*, 438 U.S. 154 (1978), struck from the affidavit supporting the search the statement regarding the three thuds Agent Braziel heard while listening at the garage (Pet App. 7a).[4] Even without that information, however, the court found that "the affidavit contains sufficient remaining facts to support the search" and denied Hebert's motion to suppress (*ibid.*).

The district court also concluded (Pet. App. 5a-6a) that there was probable cause to arrest Amuny, Antone, and Maxwell. (Hebert did not challenge the lawfulness of his arrest, apart from his effort to suppress the evidence at his residence.) The court noted that the informant's information provided sufficient detailed facts from which the officers could believe that a crime was being committed, and that the "past reliability of the informant and the corroboration of other law enforcement officers' independent investigation meets the totality of the circumstances test of *Illinois* v. *Gates*, [462 U.S. 213 (1983)]" (Pet. App. 5a).

Having lost their pretrial motions, petitioners each pleaded guilty to one count of conspiracy to possess marijuana with intent to distribute. They reserved the right to appeal the district court's rulings on the suppression motions, and did so.

3. The court of appeals affirmed. After reviewing the summary of the evidence presented by the prosecutor at the

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[4]The warrant application, signed by Braziel, set out in five detailed paragraphs the facts briefly described at pages 2-4, *supra*. The two sentences redacted out read: "Special Agent Braziel further heard a car trunk lid being opened. Further, Special Agent Braziel heard a noise like heavy objects being thrown of a trunk in a vehicle, after which the trunk lid slammed." See U.S. Br. in the Court of Appeals 17-19.

rearraignment, the court rejected arguments by Antone and Amuny that there was not a sufficient factual basis to warrant the district court's acceptance of their pleas (Pet. App. 14a-16a, 17a-18a). The court similarly rejected Antone's contention that the district court had no basis to conclude that he understood the charges against him, finding instead that "the district court followed the dictates of Rule 11 of the Federal Rules of Criminal Procedure to the letter" in determining that Antone understood the charges, and that "[n]othing in the record indicates that Antone failed to understand the charges against him" (Pet. App. 16a). The court below also concluded (*id.* at 13a-14a, 17a) that there was probable cause to arrest Antone and Amuny. The court reasoned that the agents had received "specific and detailed information" of "when, where, and how" the marijuana transaction would occur from "informants who had provided reliable information in the past," and that the agents' own surveillance had corroborated those tips (*id.* at 14a).[5]

Finally, the court of appeals agreed with the district court that Maxwell lacked standing to challenge the search of Hebert's residence because he had no legitimate expectation of privacy in it, and it rejected Hebert's argument that the district court was required to suppress the evidence seized in the search of the house because the warrant was tainted by Agent Braziel's earlier trespass (Pet. App. 18a-20a). Reasoning that the warrant "set out numerous facts in great detail," of which Agent Braziel's observations constituted "only a

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[5]Antone also argued to the court of appeals that the government deceived him by stating that only Hebert had standing to object to the search of his house and that the government violated its plea agreement with him by providing Texas authorities with information they used to levy a sales tax on his marijuana transactions. The court of appeals rejected these claims as "meritless" and without basis in the record (Pet. App. 16a-17a), and Antone does not raise them in his petition.

small part," the court found that "the warrant was clearly based on sufficient probable cause even without the evidence supplied by Braziel's illegal entry" (*id.* at 20a).

ARGUMENT

The fact-bound issues raised by petitioners were correctly decided by the courts below and involve no points regarding which there is disagreement among the circuit courts. Further review by this Court is unwarranted.

1. Petitioners Antone and Amuny contend that their guilty pleas are invalid because the charges against them were not adequately explained in the Rule 11 proceeding. They claim further that their pleas were erroneously accepted because they were not supported by a sufficient factual basis. These claims are without merit.

a. Petitioners Antone and Amuny [6] maintain (84-1812 Pet. 6-9; 84-1864 Pet. 13-17) that the court of appeals utilized the wrong standard in ascertaining whether the record established that they understood the nature of the charges to which they pleaded guilty. Antone, for instance, contends that the court of appeals' conclusion that "[n]othing in the record indicates that [he] failed to understand the charges against him" (see Pet. App. 16a) is a "negative standard" that conflicts with decisions of this Court, earlier decisions of the court below, and decisions in other circuits (84-1812 Pet. 6). Without suggesting that they in fact failed in the slightest to understand the charge to which they pleaded, petitioners assert that these decisions, and Rule 11 of the Federal Rules of Criminal Procedure, establish that the record of a guilty plea's acceptance must affirmatively demonstrate a defendant's understanding of the charges against him, which, they contend, the record here does not do.

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[6]We note that Amuny did not raise this claim before the court of appeals.

The record here, however, *does* affirmatively demonstrate that petitioners understood the nature of the charges to which they pleaded guilty, thus undercutting the premise of their contention. As the court below determined, the proceedings fully comported with Rule 11. The statement by the court seized upon by petitioner Antone as evincing the use of a "negative standard" supports their contentions only if taken wholly out of context.

At the rearraignment, the district court judge meticulously assessed whether petitioners understood the charges to which they were pleading guilty. Petitioners said they understood the charges (Tr. of Re-Arraignment 30), had no questions about them (*ibid.*), had discussed them with their lawyers (*id.* at 18, 24-25, 29), and had done and were pleading guilty to what the indictment said (*id.* at 37). The lawyers too expressed their belief that petitioners understood the proceedings (*id.* at 6). The district judge also found that petitioners "fully understood the charges" (*id.* at 47). Besides the fact that each petitioner and his lawyer said he understood the charges, there was abundant other evidence to support the district judge's finding. Petitioners were told twice that they were being charged with conspiracy to possess and distribute marijuana (*id.* at 23), a reasonably self-explanatory charge that is not difficult to understand. See *United States* v. *Dayton,* 604 F.2d 931, 938, 941-943 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904 (1980). Amuny had a college degree (Tr. of Re-Arraignment 5) and had been convicted of possession of marijuana before (84-1864 Pet. 6); Antone had graduated from high school (Tr. of Re-Arraignment 5). Each heard the indictment (*id.* at 35-37) and the outline of the evidence the government would present read to him at the rearraignment (*id.* at 38-42). It was, therefore, correct for the district court to conclude that petitioners understood the charges against them—and for

the court of appeals to find this conclusion supported by the record. Compare *Brown* v. *Perini*, 718 F.2d 784 (6th Cir. 1983).[7]

Moreover, even if it were concluded that a more detailed explanation of the charge was required by Rule 11, the failure to do so would be harmless error here in light of the extensive record at the rearraignment hearing. See Fed. R. Crim. P. 11(h). It is simply implausible that these defendants, both represented by counsel, and both competent and reasonably well-educated, would not be able to understand a rather simple charge presented to them in the well-explained context it was (of course, petitioners do not assert that they did not in fact understand the charge). As the Advisory Committee noted when recommending the addition of an explicit harmless error provision in 1983, "Rule 11 should not be given such a crabbed interpretation that ceremony [is] exalted over substance."[8] While the cases

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[7]In the cases cited by petitioner Antone (84-1812 Pet. 7-9), the district court record had substantially less evidence in it that defendant understood the charges against him. Moreover, a number of the cases he cites involved instances where the record contained affirmative evidence that the guilty plea was in some way actually defective, which no one argues is the case here. Cases more on point than petitioner's include: *United States* v. *Thompson*, 680 F.2d 1145, 1153-1155 (7th Cir.), cert. denied, 459 U.S. 1089 (1982) and 459 U.S. 1108 (1983) ("It is sufficient if the colloquy between the court and the defendant would lead a reasonable person to believe that the defendant understood the nature of the charge."); *United States* v. *Coronado*, 554 F.2d 166 (5th Cir.), cert. denied, 434 U.S. 870 (1977) (discussed note 8, *infra*); *Seiller* v. *United States*, 544 F.2d 554, 562-563 (2d Cir. 1975) ("We hold that the district court here was amply justified in relying on the reading of the indictment, coupled with [defendant's] discussions with his attorney, his age (47), his university education, his representation by counsel, his 'alacrity of responses and his show of intelligence'—in short, the court's total impression of the defendant and his understanding of the proceedings—to establish that [he] understood the nature of the charges" (citations omitted).).

[8]An illustration of harmless error under Rule 11(h) given by the Committee was "where the judge's compliance with subdivision (c)(1) was not absolutely complete, in that some essential element of the crime

cited by petitioner Antone (84-1812 Pet. 7-9) are otherwise distinguishable as well (see note 7, *supra*), all but two antedate Rule 11(h) and only one—another Fifth Circuit case—reverses a conviction after consideration of the rule.[9] The new rule is already changing the law in the circuits. See *United States* v. *de le Puente,* 755 F.2d 313, 314-315 (3d Cir. 1985), petition for cert. pending, No. 85-178; *United States* v. *Stead,* 746 F.2d 355, 356-357 (6th Cir. 1984), cert. denied, No. 84-6137 (Mar. 4, 1985); see also *United States* v. *Kearney*, 750 F.2d 787, 790-791 (9th Cir. 1984).

Especially in light of its conclusion that there was no violation of Rule ll, the court of appeals' statement that "[n]othing in the record indicates that Antone failed to understand the charges against him" (Pet. App. 16a) cannot reasonably be understood to establish some significant new standard for assessing Rule 11 violations. Rather, the statement appears to mean simply that there is nothing in the record of the plea proceedings that undercuts the conclusion suggested by that record that petitioners understood the charges to which they pleaded guilty. In light of the record and the court's entire opinion, it is abundantly

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was not mentioned, but the defendant's responses clearly indicate his awareness of that element." The note approvingly cites *United States* v. *Coronado, supra,* where, as the Committee had explained earlier, the court first held that the charge of conspiracy requires some explanation of what conspiracy means to comply with Rule 11(c)(1), but then found no reversible error "because the rule 11 proceeding on its face discloses, despite the trial court's failure sufficiently to make the required explication of the charges, that [defendant] understood them" (554 F.2d at 173).

[9] *United States* v. *Corbett,* 742 F.2d 173, 178-179 (5th Cir. 1984), found a Rule 11 proceeding prejudicially defective where the information counts were not read to defendant and defendant had not received a copy of them. As discussed above, that is not the case here.

clear that petitioners understood the charges to which they pleaded guilty. Thus, their claim was properly rejected.[10]

b. Antone and Amuny also maintain (84-1812 Pet. 9-12; 84-1864 Pet. 7-12) that there was not a sufficient factual basis to support the district court's acceptance of their guilty pleas. However, the prosecutor recited a convincing and lengthy factual basis (84-1864 Pet. 3-7), and read pertinent portions of the indictment in support of the pleas of guilty (Tr. of Re-Arraignment 34-37). In summary, he stated that he would introduce evidence that on November 1, 1982, Antone met with petitioner Maxwell at JoJo's parking lot. Later, Antone and Amuny drove together from Antone's home to JoJo's Restaurant. Maxwell, meanwhile, drove to Amuny's residence, switched cars, and returned to the restaurant. Maxwell then picked up Granger's car, drove to Hebert's residence, and returned to JoJo's. The driver of the car, Granger, was then arrested and 58 pounds of marijuana found in the trunk of the automobile. Personal documents belonging to Antone and Amuny were found in the search of the residence which also uncovered approximately 800 pounds of marijuana. Also found during the search were Amuny's fingerprints and a beeper that corresponded to one worn by Antone. Eight phone calls from Granger were made to Antone's home or beeper from July 1 to October 16, 1982. Several days prior to the arrests, Amuny's car was observed at Browning Aerial Service at

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[10]Petitioner Antone further argues (84-1812 Pet. 11-12) that his plea cannot have been voluntary because he did not admit that the evidence the government would present was true (Tr. of Re-Arraignment 44). On its face this argument seems to go to the factual basis of the plea (Fed. R. Crim. P. 11(f)), rather than its voluntariness (Rule 11(d)), though it is unconvincing in that context as well (see note 11, *infra*). In any event, even with petitioner's eleventh-hour reservations about whether he would endorse the government's evidence, there was more than enough in the record to support the district court's finding, and the court of appeals' affirmance, that the plea was voluntary, understanding, *and* factually based.

the Austin Airport. Amuny had been convicted in 1973 of possession of 150 pounds of marijuana. Finally, because of the evidentiary proceedings on the motion to suppress, the judge was aware of additional facts supporting the charges against petitioners (see Pet. App. 1a-7a).

Thus, the district court specifically found that there was a factual basis to support each of the defendants' pleas (Tr. of Re-arraignment 47). Following a review of the prosecutor's proffer to the district court and of the indictment, the court of appeals agreed (Pet. App. 14a-15a, 17a-18a). Given these concurrent factual findings by both lower courts, review by this Court of petitioners' fact-bound claims is unwarranted.[11]

2. Petitioners Antone and Amuny also contend (84-1812 Pet. 4-6; 84-1864 Pet. 17) that their arrests were not supported by probable cause. Since it does not appear that any evidence used by the prosecution was seized from petitioner

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[11]Antone confuses (84-1812 Pet. 10-12) the voluntariness issue with the sufficient factual basis issue (see note 10, *supra*). As we discuss in the preceding point, his plea was voluntary; it also had a sufficient factual basis. It is not necessary to the existence of a sufficient factual basis that defendant admit the facts the prosecution says it will present; all that is necessary, as the Fifth Circuit said (Pet. App. 14a), is that "the prosecutor * * * present evidence to the subjective satisfaction of the district court which indicates that a defendant actually committed the offense to which he is pleading guilty. *United States* v. *Davila*, 698 F.2d 715 (5th Cir. 1983)." See also *United States* v. *Dayton*, 604 F.2d 931, 938 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904 (1980). Cf. *North Carolina* v. *Alford*, 400 U.S. 25 (1970). Despite Amuny's and Antone's arguments that there was an inadequate factual basis for the conspiracy and intent elements of the charge, respectively, the evidence outlined above could certainly satisfy a judge that those elements were present. (There is also no indication here of any motive for petitioners to plead guilty to crimes they did not commit, especially if they thought the prosecutor possessed an inadequate factual basis to establish guilt. Compare *North Carolina* v. *Alford*, *supra*.)

Amuny incident to his arrest, the legality of that arrest is immaterial to the validity of his conviction. In any event, for many of the same reasons that there existed an adequate factual basis for petitioners' guilty pleas, there was also probable cause for their arrests.

Before the arrests, the agents had received "specific and detailed information" from reliable informants concerning a planned sale of marijuana by petitioners to Granger (Pet. App. 14a). As the court of appeals observed, the "informants told the agents when, where and how the transaction would occur," and "the agents' surveillance corroborated the informants' tips" (*ibid.*). For instance, Antone was observed meeting with Maxwell at a location identified by an informant as the likely site of the transaction, Maxwell then drove to Amuny's and later drove Granger's car, with the make and license plate identified by the informant, to Hebert's to pick up the marijuana, returning to the restaurant where Granger waited and where petitioners were also present. Viewed in the "totality of the circumstances" (see *Illinois* v. *Gates*, 462 U.S. 213 (1983)) there was ample basis for the findings below that probable cause existed to arrest Antone and Amuny (Pet. App. 7a, 17a-18a).

3. Petitioners Maxwell[12] and Hebert contend (84-1878 Pet. 10-14; 84-1748 Pet. 7-11) that the evidence discovered

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[12]Petitioner Maxwell was held by the courts below to lack "standing" to challenge the warrant to search Hebert's house, on the ground that he had failed to establish a reasonable expectation of privacy in those premises (Pet. App. 6a, 18a-19a). He contends (84-1878 Pet. 7-10) that his right of access to the house was indeed sufficient to afford him a right of privacy therein. We think that both petitioner and the courts below address the wrong question. The relevant privacy interest is not that affected by the execution of the warrant, but that infringed by the action found to be illegal—Agent Braziel's trespass upon the property to hear and smell what was happening in the garage. While this entirely distinct "standing" issue raises an interesting, if somewhat obscure, point, there is surely no need to consider it here because, as explained in text, the evidence seized under the warrant was not a fruit of any illegality committed by Agent Braziel.

during the search of Hebert's residence should have been suppressed because the search warrant was tainted by Agent Braziel's earlier illegal trespass on Hebert's property. This contention was rejected on the ground that the showing of probable cause to support issuance of the warrant did not depend on the information thus gained (Pet. App. 13a). In such circumstances, the courts have traditionally held that evidence seized pursuant to the warrant is not a tainted fruit of the illegally obtained information contained in the warrant affidavit. See, *e.g., United States* v. *Karo,* No. 83-850 (July 3, 1984), slip op. 13-15; *United States* v. *Smith,* 730 F.2d 1052, 1056 (6th Cir. 1984); *United States* v. *Taborda,* 635 F.2d 131, 140-141 (2d Cir. 1980); *United States* v. *House,* 604 F.2d 1135, 1143 (8th Cir. 1979), cert. denied, 445 U.S. 931 (1980); *United States* v. *Watts,* 540 F.2d 1093, 1095 n.2 (D.C. Cir. 1976). See also *United States* v. *Marchand,* 564 F.2d 983, 992-995 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978) (Friendly, J.) (collecting the cases and discussing the rule's rationale). This Court has applied the same analysis in deciding whether deliberately or recklessly false averments in the affidavit invalidate the warrant. *Franks* v. *Delaware,* 438 U.S. 154, 171-172 (1978).[13]

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[13]There is not, as suggested by petitioner Maxwell (see 84-1878 Pet. 13), a conflict among the circuits on the appropriate standard to apply when assessing a search warrant containing information from an antecedent illegal search. Contrary to Maxwell's claim, the Sixth Circuit does follow the approach in *Franks* and *Karo,* and will uphold a warrant if, after excluding illegally obtained information, the balance of the affidavit establishes probable cause. See, *e.g., United States* v. *Smith,* 730 F.2d 1052, 1056 (6th Cir. 1984); *United States* v. *Korman,* 614 F.2d 541, 547 (6th Cir.), cert. denied, 446 U.S. 952 (1980). The two cases cited by petitioner are not in any way inconsistent with the approach taken in *Franks* and *Karo*—see *United States* v. *Giordano,* 416 U.S. 505, 556 n.6 (Powell, J., concurring in part and dissenting in part); *United States* v. *Grunsfeld,* 558 F.2d 1231, 1241 (6th Cir.), cert. denied, 434 U.S. 872 (1977) and 434 U.S. 1016 (1978)—and were, in any event, decided before them and the more recent Sixth Circuit cases. Maxwell does not claim that any other circuit (besides the Sixth) is in disagreement with the approach taken by the Fifth Circuit in this case.

Petitioners suggest that this analysis has been placed in doubt by *Segura* v. *United States,* No. 82-5298 (July 5, 1984). In Hebert's view (84-1748 Pet. 7-11), *Segura* formulated a test that looks instead to whether the prior illegal intrusion contributed in any way to the discovery of the evidence seized under the search warrant. We are not sure that this formulation reaches a result different from the traditional approach: if there is probable cause even after the illegal evidence is excised from the warrant, it is difficult to see how it contributes to the finding of subsequent evidence. Similarly, the "critical element" formulation advocated by petitioner Maxwell (84-1878 Pet. 10-13) appears to be, even on its own terms, really nothing more than the traditional *Franks* test: if there was adequate evidence to support the warrant when the illegal evidence is excised (*i.e.,* if that evidence is not "critical"), then the warrant is valid. See *Segura,* slip op. 19. That test is met here.

In any event, petitioners' contention that *Segura* creates a new rule is absurd. This Court gave no indication it was undertaking such a dramatic reversal; indeed, just two days earlier, in *United States* v. *Karo,* No. 83-850 (July 3, 1984), slip op. 13, the Court had reaffirmed the *Franks* approach. In *Karo,* in the context of cleansing a tainted warrant, the Court stated that, despite the presence in the supporting affidavit of illegal evidence, "if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause, the warrant was nonetheless valid." That is precisely the situation here. *Segura,* on the other hand, had nothing to do with a "cleansed" warrant.

In any event, *Segura* stated that "[w]hether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized" (slip op. 17) and that "our cases make clear that evidence will not be excluded as 'fruit' unless the illegality is

at least the 'but for' cause of the discovery of the evidence" (*id.* at 19). These principles, of course, would indicate that *Franks* and *Karo* are still viable. So does *Segura's* holding: if the illegal prior entry there did not invalidate an otherwise valid search warrant, there is no reason why the prior trespass here should invalidate a search warrant valid once cleansed. Petitioners' attempt to manufacture a new—and vague and confusing—standard from *Segura* by taking phrases from it out of context is wholly unconvincing.

Only two sentences in Braziel's lengthy affidavit (see note 4, *supra*) contained evidence relating to his earlier observations at Hebert's residence, which the district court believed were the product of an impermissible trespass.[14] The district court reviewed the warrant, leaving out those two sentences, and found that it contained "sufficient remaining facts to support the search" (Pet. App. 7a). As the court of appeals observed (*id.* at 20a), the "request for a search warrant set out numerous facts in great detail," of which Agent Braziel's allegedly illegal observations constituted "only a small part." Thus, the court correctly concluded, "the warrant was clearly based on sufficient probable cause even without the evidence supplied by Braziel's illegal entry" (*ibid.*).[15]

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[14]We do not concede that the district judge properly excluded Agent Braziel's observations. Nevertheless, because the information is not necessary to the warrant's validity, this brief assumes that the ruling was correct.

[15]Hebert also complains (84-1748 Pet. 11-13) that the court below erred in failing to strike from the warrant affidavit as a fruit of Braziel's earlier illegal search the agent's observations concerning Granger's arrest. But probable cause to stop and arrest Granger existed without Braziel's observations at the residence, for the same reasons that there was probable cause to arrest petitioners Antone and Amuny (see pages 12-13, *supra*).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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